

ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1063 (and consolidated cases)

UNITED STATES TELECOM ASSOCIATION, et. al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order of the Federal Communications Commission

BRIEF *AMICUS CURIAE* OF MULTICULTURAL MEDIA, TELECOM AND
INTERNET COUNCIL IN SUPPORT OF PETITIONERS

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August 6, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the Multicultural Media, Telecom and Internet Council (“MMTC”) states as follows:

MMTC is a membership organization incorporated in the District of Columbia and recognized by the IRS as a nonprofit corporation under 26 U.S.C. §501(c)(3). MMTC has no parents, subsidiaries, or affiliates that have issued shares to the public.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici Curiae*. Pursuant to D.C. Circuit Rule 28(a)(1), the Multicultural Media, Telecom and Internet Council (“MMTC”) appears in this Court as *amicus curiae* in support of Petitioners (with the exception of the petitioner in Case No. 15-1151). All other parties, intervenors, and *amici* appearing before the FCC in the proceedings below and in this Court are listed in the Joint Brief for United States Telecom Association *et al.*

(B) Rulings Under Review. The ruling under review is the Federal Communications Commission’s (“FCC”) *Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) (“*Order*”) (JA __ - __).

(C) Related Cases. The Order has not previously been the subject of a petition for review by this Court or any other court. All petitions for review of the *Order* have been consolidated in this Court, and petitioners are unaware of any related cases pending before this Court or any other court.

CERTIFICATE OF COUNSEL

Pursuant to Fed. R. App. P. Rule 29(c)(5) MMTC affirms that no counsel for a party authored this brief in whole or in part, and no counsel, party, or person other than the Multicultural Media, Telecom and Internet Council made a monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE* AND AUTHORITY TO FILE

On July 14, 2015, the Multicultural Media, Telecom and Internet Council (“MMTC”) filed a Motion for Leave to file a brief as *amicus curiae*, pursuant to Federal Rule of Appellate Procedure 29(a)-(b) and D.C. Circuit Local Rule 29(b) and (d). On August 4, 2015 the Court granted our motion. Clerk’s Order, August 4, 2015. MMTC supports petitioners except for those in Case No. 15-1151.

In 1986, MMTC was established as a national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the media and telecommunications industries. MMTC performs civil rights advocacy, conducts research and analysis, particularly in the area of broadband Internet access services and broadband adoption, and regularly participates in FCC rulemaking proceedings. MMTC supports efforts to close the “digital divide” and bring broadband access to more people of color and other vulnerable populations.

MMTC participated in the FCC’s Open Internet proceedings under review, *see Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) (“*Order*”) (JA __-__), in which the Commission reclassified broadband Internet access services under Title II of the 1934 Communications Act.

MMTC, together with 44 other civil rights, social welfare and professional organizations, warned the FCC against the reclassification of broadband because it

would deeply harm the tens of millions of Americans not yet connected to broadband networks. MMTC has a demonstrated interest in the outcome of this case to protect the interests of historically disadvantaged groups, including some MMTC members, who have limited or no access to broadband services. *See* Fed. R. App. 29(b)(1).

MMTC concurs in the petitioners' argument that the *Order* is unlawful, for the reasons they articulate. *See* USTelecom Brief at 30-94. In filing this brief, however, MMTC addresses issues not developed by petitioners that are unique to MMTC's partners and constituents, and that may be of assistance to the Court and relevant to the disposition of this case. *See* Fed. R. App. 29(b)(2).

STATEMENT OF THE ISSUE

Whether the FCC arbitrarily and capriciously failed to consider the adverse impact on unserved and underserved communities of reclassifying broadband Internet access as Title II telecommunications services.

SUMMARY OF THE ARGUMENT

The Court should vacate the FCC's *Order* reclassifying broadband Internet access service as subject to Title II public utility regulations.

First, the FCC acted arbitrarily and capriciously in disregarding the comments of MMTC and other civil rights, social service and professional organizations representing the interests of unserved and underserved communities, and by failing to address our concerns that imposing Title II public utility regulation on wireline and wireless broadband access services will have a deleterious effect on people of color and other historically disadvantaged groups.

Second, in addition to the legal and factual infirmities highlighted in the Petitioners' opening brief, the agency's radical reversal of the longstanding light-touch regulatory approach will negatively impact both investment and innovation in broadband generally, and this diminution of investment and innovation will hit hardest those communities and consumers who are already the most underserved.

Third, the *Order* imposes new restrictions, and creates substantial uncertainty, surrounding new creative service offerings in broadband service

providers may seek to deploy. The effect of that action will preempt new choices for consumers which directly impact broadband adoption. Examples include new business models, such as ad-supported offerings, that would have proven useful in addressing affordability and other barriers to broadband adoption.

Fourth, the FCC also did not meaningfully consider the impact that imposing Title II public utility regulation on *wireless* broadband will have on those who rely on mobile devices as their primary or only mode of broadband access. Consumers of color are increasingly reliant on wireless broadband, and the FCC's previous regulatory approach was successful in drawing robust investment and innovation in these services, to the benefit of these consumers. The FCC's imposition of Title II regulation on wireless broadband will reverse the net positive trends in mobile broadband adoption and make that mode of broadband access more costly and less accessible.

MMTC and more than 45 national civil rights, social service and professional organizations, in combined and separate filings and representing millions of constituents, specifically outlined these concerns to the FCC throughout the proceeding. The FCC's failure to even address the impact of its *Order* on the unserved and underserved communities whose interests MMTC and the other organizations represent, was arbitrary and capricious.

ARGUMENT

- A. THE FCC ACTED ARBITRARILY AND CAPRICIOUSLY BY NOT ADDRESSING THE IMPACT OF TITLE II RECLASSIFICATION OF BROADBAND ON THOSE WHO ARE ON THE WRONG SIDE OF THE DIGITAL DIVIDE.

The FCC's *Order* should be vacated because it violates Section 254(b)(2) of the Communications Act of 1996's requirement that the FCC ensure nationwide access to "advanced telecommunications and information services. . ." By reclassifying broadband Internet access service as a "telecommunications service" subject to public utility regulation, the FCC failed to consider the irreparable harm that would result to communities and consumers currently on the wrong or unconnected side of the digital divide. These communities are directly impacted by the unlawful decision to treat broadband as a public utility since they do not, and under this *Order*, likely will not experience nationwide access to these advanced telecommunications services.¹

MMTC and more than 45 national civil rights, social service and professional organizations, in combined and separate filings and representing millions of constituents, specifically outlined these concerns to the FCC throughout the proceeding. The FCC's failure to even address the impact of its *Order* on the

¹ MMTC agrees with Petitioners that the FCC's *Order* was statutorily unlawful in reclassifying Broadband Internet Access Service as a "telecommunications service" subject to public utility regulation.

unserved and underserved communities whose interests MMTC and the other organizations represent, was arbitrary and capricious.

In a Letter to the Commission, MMTC stated that: “Title II regulation, even when ostensibly administered with a lighter touch, will likely have unintended consequences on broadband adoption for people of color, the disabled, the economically disadvantaged, rural residents and seniors.” *See* Letter from Kim Keenan, MMTC President and CEO, to Hon. Tom Wheeler, Chairman, FCC, *et.al.*, GN Docket No. 14-28, at 3 (Feb. 18, 2015), JA _____ - _____. By the *Order*, the FCC arbitrarily and capriciously abdicated its obligation to ensure nationwide broadband access to *all* Americans, as Congress contemplated in 47 U.S.C. §151 (as amended in 1996) and in Section 706 of the 1996 Telecommunications Act (“Section 706”).

Access to these services is the essential gateway to educational attainment, employment opportunity and an enhanced quality of life. Without broadband access, people of color and other historically disadvantaged populations have more limited opportunities to gain new skills, secure quality and high wage jobs, obtain a quality education, participate in our civic dialogue, and benefit from advanced telemedicine and other technologies. This will impact the future of all Americans not just those tens of millions of Americans who are not contemplated in the *Order*.

The FCC is well aware that there is a “digital divide” in America, having observed that people of color have profoundly low levels of broadband adoption compared to the majority population. *See, e.g.*, 2015 Broadband Progress Reports, paras 104-105, National Broadband Plan, 17 (citing John Horrigan, Broadband Adoption and Use in America (OBI Working paper No. 1 (FCC, 2010), JA ____).

In spite of its acknowledgment that the digital divide persists and that there are profound disparities in broadband adoption based on race, location and wealth, the *Order* failed to address the unique impact of reclassification of broadband on people of color, seniors, rural communities and other less privileged consumers, particularly the economically disadvantaged, and those who are underserved or unserved by broadband at present. Rather, the *Order* only references the needs of persons with disabilities, *Order* ¶¶220-30, JA ____ - ____, failing to consider the needs of other disadvantaged groups whose unique concerns were brought to its attention. The FCC’s *Order* is unlawful because it failed to take into account the adverse effects that such action will have on other digitally disadvantaged groups.

MMTC and dozens of other civil rights, social service and professional organizations support the FCC’s goals for an open Internet. However, the legal uncertainty associated with Title II classification was one of the reasons that MMTC argued that the FCC rely on its Section 706 authority to adopt open Internet rules that would protect consumers.

Failure by an agency, such as the FCC, to discern the full impact of its actions on *all* citizens is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”) (agency rule considered arbitrary and capricious if agency has “failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.”)²

History and economics demonstrate that Title II regulation of broadband discourages investment in high-speed networks, as evidenced by a wealth of analyses in the record. But even more important to MMTC is that this diminished investment is most likely to harm those communities that are already unserved or underserved. *See* Justin P. Hedge, *The Decline of Title II Common-Carrier Regulations in the Wake of Brand X: Long-Run Success for Consumers, Competition, and the Broadband Internet Market*, *CommLaw Conspectus: Journal of Communications Law and Technology Policy* (2006), available at <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1340&context=commlaw> (last visited July 14, 2014).

² *See also ITT World Communications, Inc. v. FCC*, 725 F.2d 732, 742 (D.C. Cir. 1984) (FCC decision vacated for failure to adequately consider relevant factors); *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1573 (D.C. Cir. 1987) (FCC decision found to be arbitrary and capricious because order did not reflect awareness of the practical ramifications of the decision).

The FCC's decision to impose Title II classification on wireline and wireless broadband is arbitrary and capricious because it simply overlooked the comments of MMTC and other advocates for the digitally disadvantaged. While the FCC gave great weight to hypothetical concerns raised by "edge providers" and organizations representing the digital elite, there was no meaningful consideration on the impact of the decision on the tens of millions of citizens represented in the proceeding by organizations that argued that Title II regulation was not necessary to achieve the agency's open Internet goals and could harm broadband consumers on the other side of the digital divide. *See* MMTC and Nat'l Minority Orgs., Comments (July 18, 2014), pp. 9-10, JA ____ - ____; *see also* Kevin A. Hassett & Robert Shapiro, Georgetown Center for Business and Public Policy, *Towards Universal Broadband: Flexible Broadband Pricing and the Digital Divide 12* (August 2009).

Comments from MMTC and the other supporting organizations specifically urged the Commission to avoid reclassification of broadband as "telecommunications services" subject to Title II regulation, "given the prodigious work that needs to be completed to close the digital divide. *See* MMTC and Nat'l Minority Orgs. Comments, GN Docket No. 14-28 (July 18, 2014) at 9-10, JA ____ - _____. As MMTC argued, the long standing light-touch regulatory approach promoted engagement by communities of color whereas reclassifying broadband

under Title II would endanger this progress by adversely impacting broadband adoption and investment. *See* MMTC and Nat'l Minority Orgs., Comments, GN Docket No. 14-28 (July 18, 2014) at 6-11, JA____ - ____; MMTC and Nat'l Minority Orgs., Reply Comments, GN Docket No. 14-28 (Sept. 15, 2014) at 3-5, 9-11, JA____ - ____ and ____ - _____. Other leading national civil rights organizations expressed the same concern. *See* League of United Latin American Citizens, National Action Network, National Association for the Advancement of Colored People, the National Coalition on Black Civic Participation and the National Urban League, Comments, GN Docket No. 14-28 (July 18, 2014), JA____ - _____.

To bring historically disadvantaged populations online, these groups must first have access to robust broadband networks. The FCC's approach, however, discourages the heavy investment required to build those networks, and this decrease in broadband investment will disproportionately harm communities that are already underserved. It is well documented by the FCC that significant investment in broadband infrastructure improves access in all communities, *See* FCC, Connecting America: The National Broadband Plan, available at <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> (March 16, 2010) and this is particularly important to economically disadvantaged and rural communities that tend to be affected by increases or decreases in

investment and concomitant price changes. *See, e.g.*, Kevin A. Hassett & Robert Shapiro, Georgetown Center for Business and Public Policy, *Towards Universal Broadband: Flexible Broadband Pricing and the Digital Divide* 12 (August 2009), JA ____.

The record below contains substantial evidence from academics and economists, broadband providers, and public interest groups about the harmful effect that price regulation and other Title II public utility regulations will have on broadband investment and deployment.³ The record shows that broadband providers have made massive investments in their facilities under the longstanding, light-touch approach to broadband regulation.⁴ The Department of Justice warned

³ *See, e.g.*, Christopher Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?* (2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521285448> (attached to *Ex Parte* Notice from Christopher Yoo, University of Pennsylvania, GN Docket No. 14-28 (June 10, 2014)), JA ____ - ____; Roslyn Layton & Michael Horney, *Innovation, Investment, and Competition in Broadband and the Impact on America's Digital Economy* (Mercatus Center at George Mason University, Working Paper No. 14-22, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521867720>, GN Docket No. 14-28 (Sept. 10, 2014), JA ____ - ____; Richard Bennett, American Enterprise Institute, *G7 Broadband Dynamics: How Policy Affects Broadband Value in Powerhouse Nations* 110 (Preliminary Draft 0.3, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7522666966> (attached to Reply Comments of Richard Bennett, GN Docket No. 14-28 (Sept. 15, 2014)), JA ____ - ____.

⁴ Everett Ehrlich, *The State of U.S. Broadband: Is It Competitive? Are We Falling Behind?* (2014), available at http://www.progressivepolicy.org/wp-content/uploads/2014/06/2014.06-Ehrlich_The-State-US-Broadband_Is-it-competitive-are-we-falling-behind.pdf (“Ehrlich Report”), JA ____ - ____ (noting

the FCC about how investment would be jeopardized by a heavy-handed approach, noting that price regulation would undermine investment in broadband facilities. See Comments of the U.S. Department of Justice, *Economic Issues in Broadband Competition; A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 28 (Jan. 4, 2010), JA _____. Evidence available before and after the rulemaking strongly suggests that the impact of Title II on investment will be negative, adversely affecting the build out or maintenance of high-speed broadband networks in communities of color and stifling broadband adoption. See Kevin A. Hassett and Robert Shapiro, “Regulation and Investment: A Note on Policy Evaluation under Uncertainty, With an Application to FCC Title II Regulation of the Internet” (July 14, 2015); see also AT&T Ex Parte Letter, GN Docket No. 14-28 (May 9, 2014), JA ____-____ (containing predictions of several independent experts that Title II reclassification would discourage broadband investment). Decreased investment and stalled innovation will leave the digitally disadvantaged further behind. The burden of this unlawful *Order* will be borne on the backs of every American.

B. THE FCC ACTED ARBITRARILY AND CAPRICIOUSLY IN FAILING TO CONSIDER THE IMPACT THAT IMPOSING TITLE II PUBLIC UTILITY REGULATION ON WIRELESS

that the U.S. broadband industry has invested \$1.2 trillion since the 1996 Act was passed), *discussed in* Jan. 26, 2015 Verizon Letter to FCC at 2, JA _____.

BROADBAND WOULD HAVE ON HISTORICALLY DISADVANTAGED COMMUNITIES.

The FCC's approach will also have a chilling effect on investment and innovation in mobile broadband – a concern of particular importance to MMTC and the consumers it represents, because they disproportionately rely on mobile services as their primary means for going online.

From 1995 to 2014, when the FCC adopted a “hands off” approach to wireless, investment, innovation and widespread deployment occurred. As a result, wireless usage is almost ubiquitous, and “communities of color benefitted exponentially,” especially in the area of mobile broadband adoption.

MMTC opposes any reclassification of broadband Internet access service as Title II services, whether fixed or mobile. The affordable and accessible broadband internet services offered by numerous wireless providers have helped to close the gap between the digital elite and the un-connected. As MMTC and the host of civil rights, social service and professional organizations pointed out,⁵ continued robust investment and innovation is needed for mobile broadband to

⁵ See MMTC and Nat'l. Minority Orgs., Comments, GN Docket No. 14-28 (July 18, 2014), JA ____ - ____; Reply Comments of MMTC and Nat'l Minority Orgs., Reply Comments, GN Docket No. 14-28 (Sept. 15, 2014), JA ____ - ____; NAACP and Communications Workers of America, Comments, GN Docket 14-128 (filed July 15, 2014), JA ____ - ____; National Urban League, National Coalition on Black Civic Participation, National Action Network, NAACP, and the League of United Latin American Citizens, Letter, GN Docket No. 14-28 (July 18, 2014), JA ____ - ____.

improve and become a more comparable and competitive service to advanced wireline broadband services.

In addition to adversely affecting broadband investment and deployment, the restrictions adopted by the FCC could undermine creative new ways to encourage adoption and address affordability. For example, innovative offerings by mobile wireless providers which include sponsored data plans and zero rate services can benefit consumers, especially those in disadvantaged populations, by allowing them to access certain content without using their monthly data allowance. These creative offerings increase consumers' choices and reduce their costs. These creative offerings increase consumers' choices and reduce their costs. The FCC, however, has now cast a cloud of uncertainty over these and other possible "zero rated" offerings by announcing that they will be subject to pricing review under the no-unreasonable interference/disadvantage standard. *See Order* at ¶152, JA ____.

Subjecting such innovative offerings that can help close the digital divide represents yet another failure by the FCC to consider the interests of historically disadvantaged populations and in this instance, consumers as a whole, in its reclassification decision.

CONCLUSION

The FCC's decision was arbitrary and capricious because it failed to evaluate the adverse impact that public utility regulation on both wireline and wireless broadband would have on the ongoing effort to close the digital divide. Every American must benefit from broadband advancement and innovation if we are to have a strong digital ecosystem with net equality. Since the *Order* overlooked the impact of Title II reclassification on the unserved and underserved, which is "an important aspect of the problem," *State Farm*, 463 U.S. at 43, the *Order* should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I certify the following:

1. This brief complies with the page limitations of Fed. R. App. P. 29(d) because it is 3,002 words in length.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2015, I electronically filed the foregoing “Reply Brief of Intervenor Multicultural Media, Telecom and Internet Council” with the Clerk of the Court of Appeals for the District of Columbia Circuit through the CM/EDF system and it was served electronically to all parties and amici through that system.

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